The City of New York

POLICE DEPARTMENT

August 6, 2015

MEMORANDUM FOR: Police Commissioner

Re: Detective Charne Jimenez
Tax Registry No. 940304
Gang Squad Bronx
Disciplinary Case No. 2014-12473

Lieutenant Terrell Anderson
Tax Registry No. 933551
Recruit Training Section
Disciplinary Case No. 2014-12474

The above-named members of the Department appeared before the Court on May 6, 2015, charged with the following:

Disciplinary Case No. 2014-12473

1. Said Police Officer Charne Jimenez, on or about April 15, 2013, at approximately 1530 hours, while assigned to Brooklyn South Gang Squad and on duty, in the vicinity of [redacted], Bronx County, abused his authority as a member of the New York City Police Department, in that he frisked Person A without sufficient legal authority.

P.G. 212-11, Page 1, Paragraph 2 – STOP & FRISK

Disciplinary Case No. 2014-12474

1. Said Sergeant Terrell Anderson, on or about April 15, 2013, at approximately 1530 hours, while assigned to Brooklyn South Gang Squad and on duty, in the vicinity of [redacted], Bronx County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he searched a car in which Person A and Person B were occupants, without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT

The Civilian Complaint Review Board (CCRB) was represented by Simone Manigo, Esq. Respondents were represented by Michael Lacondi, Esq., Karasyk & Moschella LLP.

Respondents pleaded Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent Jimenez is found Guilty. Respondent Anderson is found Not Guilty.

FINDINGS AND ANALYSIS

Introduction

On April 15, 2013, the Major Case Squad was investigating a long-term, wide-ranging case involving the sale of firearms and drugs to undercover officers. One of the locations in question was a building [redacted] There was to be a search warrant executed at an apartment in that building, as well as arrest warrants.

Members of Gang Squad Brooklyn South (GSBS) were assigned to assist on the execution of the warrant. Respondent Anderson (then a Sergeant but now a Lieutenant) was the supervisor of the other three GSBS officers that were assigned to help: Detectives Kevin Tagnosky and Joebian Ortiz, and Respondent Jimenez (then a Police Officer but now a Detective). Respondent Anderson's task was to supervise the entry into the apartment. The entry was to be performed by the GSBS officers as well as those from Major Case. The apartment was believed to be a stash house and not necessarily the residence of the subjects.

Respondent Anderson testified that his supervisors at GSBS gave him some very basic, quick information about the operation. They had to move quickly because he was told that time

was short. He just as quickly relayed the information he was given to the other officers. He was told to meet the other officers from Major Case, and once other officers arrived, the warrant would be executed. Respondent Anderson met some of the other officers but did not even learn all of the subjects' names.

Respondent Jimenez described the pre-operational meeting as "a quick tactical plan." They were told that there were three subjects and quickly glimpsed the paperwork, which contained the subjects' names. There might have been photographs. Time was of the essence, however, and "at the time we didn't get to – it was a quick 'Get to the Bronx, we're doing emergency search warrants and arrest take-downs.'"

Respondent Anderson was in a vehicle with Ortiz and Respondent Jimenez was in a vehicle with Tagnosky. Respondent Anderson testified that an officer from Major Case got on the radio and stated that "one of the subjects or a possible subject" was leaving the building. The Major Case detective stated that the individual was carrying packages, and gave Respondent Anderson a description of his vehicle. Respondent Anderson instructed Respondent Jimenez and Tagnosky to pull the car over. Respondent Jimenez confirmed at trial that he received such a transmission.

This individual was the complainant, Person A. He got into his [redacted] with Person B and began driving. It was undisputed that Person A actually had nothing to do with the investigation. The package apparently contained perfumes or colognes, which Person A sold on eBay.

Respondent Jimenez testified that he and Tagnosky pulled over Person A's vehicle a short distance away after he failed to come to a complete stop at a stop sign. Respondent Jimenez instructed Person A to get out of the vehicle. He complied and showed Respondent Jimenez his

driver's license upon direction. Respondent Jimenez asked Person A if he had any weapons or "anything that he shouldn't be having on him." Person A replied that he did not.

Respondent Jimenez testified that he was unsure whether Person A was one of the suspects. Respondent Jimenez testified that he feared for his safety due to the nature of the Major Case investigation, which involved a large amount of firearms and narcotics. He also testified that he saw bulges in Person A's pockets. Therefore he frisked Person A.

Case No. 2014-12473: Respondent Jimenez

Respondent Jimenez is charged with unlawfully frisking Person A. Reasonable suspicion is required for a frisk, even when the stop is justified. Because the CCRB did not charge Respondent Jimenez with stopping Person A's vehicle unlawfully, the justification for the vehicular stop is not at issue.

Suspicion to justify a frisk can be unparticularized if the stop is for a violent crime, like robbery. Here, however, Respondent Jimenez needed an independent, reasonable belief of immediate danger to himself in order to frisk Person A. See Legal Bureau Bulletin, Vol. 1[illegible]o. 3. p. 3 (Mar. 31, 1971); People v. Mack, 2[illegible].Y.2d 311, 317 (1970); Patrol Guide § 212-11 (2).

A simple pocket bulge is insufficient, and in any event, Respondent Jimenez did not perceive these bulges to be a weapon. He simply said that the items could have been weapons, but any bulge "could" be a weapon. Cf. People v. Howard, 147 A.D.2d 177, 181 (1st Dept. 1989) (mere observation of undefinable pocket bulge is insufficient for frisk). In fact, the bulges turned out to be a wallet and a cell phone. More testimony was necessary to determine the solidity of Respondent Jimenez's belief about the items in order for a frisk to have been

authorized. Finally, Respondent Jimenez stated at his CCRB interview that he did not see bulges on Person A.

The possibility of Person A being a suspect in this investigation also was insufficient to allow the frisk to be lawful. First, it only was a possibility even as stated by the Major Case officer. Respondent Jimenez did not know the name of the putative suspect or a meaningful description. There was very little evidence about the investigation other than that it involved firearms. There was no testimony, for example, that the suspect was known to carry a firearm. In light of this, Respondent Jimenez is found Guilty.

Case No. 2014-12474: Respondent Anderson

After Respondent Jimenez frisked Person A, Respondent Anderson arrived. Respondent Jimenez handed his supervisor Person A's ID. Respondent Anderson confirmed over the radio that Person A was not one of the subjects in question, although he testified that Person A looked similar. Person A was released with an apology.

Person A and Person B did not testify but gave statements to the CCRB. Each stated that an officer searched the vehicle. Person A was able to describe the searching officer but not by name.

Respondent Anderson testified that "[t]here was some small talk" after Person A's innocence was confirmed, before he was released. He denied entering or searching Person A's vehicle. He saw several boxes through the windows of Person A's car, but did not reach in with his hands or stick his head in. In fact, because Respondent already had confirmed that Person A was uninvolved, the boxes had no evidentiary value to him. Person A told Respondent that he sold colognes on eBay. In his interview, Person A confirmed that he and Respondent spoke about

the fragrances toward the end of the encounter. Eventually, Respondent Anderson testified, the warrant was executed with positive results.

Respondent Anderson is charged with searching –not merely entering –Person A's vehicle without legal authority. The only direct evidence of this at all was Person A and Person B's hearsay statements. The CCRB's case, however, is built on several pillars. First, Person A described the officer as black, approximately 6'1" to 6'2" in height, slim but muscular like an athlete, and aged in his mid-to late 20s. Anderson, who was African American, testified that he was 5'10", weighed about 180 pounds, and was 34 years old. Second, Respondent Jimenez agreed that there were only four officers at the scene: himself, Respondent Anderson, Tagnosky and Ortiz. Third, Respondent Anderson was the only black officer of this quartet. Fourth, Respondent Jimenez conceded at his CCRB interview that someone entered the vehicle. According to the CCRB, if an African American officer entered the vehicle, and Respondent Anderson was the only officer fitting that description, it had to be him.

The case cannot, however, be wrapped up in such a neat box. Respondent Jimenez's testimony cannot be read as a concession that Respondent Anderson searched the vehicle. Respondent Jimenez testified on direct examination that neither Respondent Anderson nor any other officer searched or entered Person A's vehicle. He was confronted on cross with his CCRB interview, however, in which he was asked. "Did you ever see another officer enter the vehicle," and answered, "Yeah, an officer did enter the vehicle. I don't know who it was." He explained this at trial by saying, "I know when I was in the back I saw nobody going into the car. If someone did go into the car, I wouldn't know who it was. But I know it wasn't the officers and the supervisor that was on scene."

The CCRB did not delve into at trial whether Respondent Jimenez was asked further questions during the interview in this regard to clarify what he meant by "enter." Considering his other statements at trial, it is far from certain that Respondent Jimenez meant that an officer crossed the threshold of the vehicle in a way that made a search even possible.

It also is far from certain Person A's account established that Respondent Anderson searched the vehicle. Although hearsay is admissible in this forum, see Matter of Ayala v. Ward, 170 A.D.2d 235 (1st Dept. 1991), there are significant reasons for caution in cases like this that present close questions of credibility. The hearsay is central to the CCRB's case, so there is a question of basic fairness in using the hearsay to reach a finding of fact. See *Case No. 77005/01*, p. 6 (May 27, 2002) (hearsay declarations are insufficient to support findings of guilt in cases that pose close questions of credibility).

No reason was proffered by the CCRB for Person A and Person B's failure to appear at trial. Person A, in his interview, mentioned that he was interested in pursuing legal action against the Department (CCRBX 1, p. 56). In light of their failure to testify, the unexplained nature of which detracts from their credibility, the Court cannot observe their demeanor, explore possible motives to lie, or assess the credibility of their accounts after the test of cross-examination.

There were several key aspects on which a trial would have been able to probe Person A's claims. For example, he stated that the officer opened the door and "jumped" in. The officer's feet were "hanging out from my driver's door," yet somehow his feet remained on the ground all five to seven minutes of the supposed search. "I mean, he might've had, like, one knee into the car." Person A's personal effects were left undisturbed during this five to seven minute search. Furthermore, Person A said that he did not see what parts of the officer's body were entering his car, yet also described him as "leaning in" to the vehicle (CCRBX 1, pp. 9, 43-46, 50, 52-53).

All of these were colorable inconsistencies and raised questions about what, if anything, Respondent Anderson could have been searching. Direct and cross examination might have clarified Person A's claims, but this did not happen.

Further, the CCRB argued that Respondent Anderson could not have seen the fragrance packages due to the tints of the car. Although Respondent Anderson did not recall, Person A indicated that the rear windows and rear windshield were tinted at 5% light transmittance. This, as he mentioned, was legal because the vehicle was classified as an SUV (CCRBX 1 at pp. 19-20.51). See Vehicle & Traffic Law § 375 (12-a)(b). Person B, however, testified that the doors were open and that one could see through the posterior windshield tints (CCRBX 2, pp. 31-32). Person A claimed that he had shut the driver's side door behind him (CCRBX 1, p. 44). This conflict too could have been explored at trial.

In sum, the totality of the evidence does not exclude the possibility that Respondent Jimenez's and Person A's observations consisted of something other than the officer conducting a "search" of the vehicle, as charged in the specification. As such, Respondent Anderson is found Not Guilty.

PENALTY

In order to determine an appropriate penalty, Respondent Jimenez's service record was examined. See Matter of Pell v. Board of Educ., 34 N.Y.2d 222 (1974). Respondent Jimenez was appointed to the Department on January 9, 2006. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The CCRB's recommendation of the forfeiture of 5 vacation days as a penalty is too harsh in light of the most recent cases imposing fewer days of forfeiture. Respondent Jimenez has nearly ten years of service and no prior formal disciplinary record. Instead, the Court recommends a penalty of the forfeiture of 3 vacation days. See, e.g., *Case No. 2014-12398*, pp. 5, 7 (June 22, 2015) (3 days for frisk with no legal justification offered).

Respectfully submitted,

David S. Weisel
Assistant Deputy Commissioner – Trials

APPROVED

SEP 21 2015

WILLIAM J. BRATTON
POLICE COMMISSIONER

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
DETECTIVE CHARNE JIMENEZ
TAX REGISTRY NO. 940304
DISCIPLINARY CASE NO. 2014-12473

On his last three annual evaluations, Respondent Jimenez received an overall rating of 4.5 "Extremely Competent/Highly Competent" twice and 4.0 "Highly Competent" once. He has been awarded nine medals for Excellent Police Duty and 14 for Meritorious Police Duty. [redacted]

Starting in March 2010, Respondent Jimenez spent a year on Level I Force Monitoring for receiving three or more CCRB complaints in one year. Respondent has no prior formal disciplinary record.

For your consideration.

David S. Weisel
Assistant Deputy Commissioner – Trials